No. 7302

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

DANG NAM,

Appellant,

vs.

JAMES B. BRYAN, District Director of Immigration, Port of Honolulu, Territory of Hawaii,

Appellee.

Upon Appeal from the United States District Court for the Territory of Hawaii.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

I.

STATEMENT OF THE CASE

This case comes on appeal from an order of the United States District Court for the Territory of Hawaii entered December 1, 1932, discharging the writ of habeas corpus and remanding the petitioner Dang Nam to James B. Bryan, District Director of Immigration at the Port of Honolulu, Territory of Hawaii, now succeeded by W. G. Strench, District Director of Immigration at the Port of Honolulu.

Dang Nam was indicted in Honolulu charging in count one a violation of the Act of February 9, 1909, (The Narcotic Drugs Import and Export Act), and in count two a violation of the Act of December 17, 1914, (Harrison Narcotic Act). (R. pp. 8-10). On April 18, 1932, the defendant entered a plea of guilty to both counts. On count one, sentence was suspended and he was placed on probation for three years, and on count two he was sentenced to six months' imprisonment. The Judge, in sentencing the defendant, recommended against deportation, as authorized by Section 19 of the Immigration Act of February 5, 1917 (8 U.S.C.A. Sec. 155).

On June 29, 1932, the Secretary of Labor directed to the District Director of Immigration, at Honolulu, Territory of Hawaii, a warrant for the arrest of the alien Dang Nam, reciting his then presence in the United States, a violation of the Immigration Act of February 18, 1931 (8 U. S. C. A. Sec. 156 (a)) (R. pp. 42-43). Appelant then resorted to a petition for a writ of habeas corpus to be relieved from deportation (R. pp. 4-7). The trial court held that its prior recommendation against deportation at the time of passing sentence was without legal justification and void, since the Act of February 18, 1931 (8 U.S.C.A. Sec. 156 (a)) was mandatory in its provision and deprived the court of the authority vested in it by Section 19 of the Immigration Act of February 5, 1917 (8 U.S.C.A. Sec. 155), and remanded appellant to the immigration authorities.

II.

ARGUMENT.

In representing this appeal to the court, the appellant has summarized his three assignments of error (R. pp. 60-61) into one question of law, within which summarization, for the purposes of this appeal, the appellee shall confine himself.

The alleged error appealed from being:

That the court erred in deciding that the provision of the Act of February 18, 1931 (8 U.S.C.A. Sec. 156 (a)) makes deportation of an alien (except a non-dealing addict) mandatory after conviction and sentence.

The Act of February 18, 1931 (46 Stat. 1171, 8 U.S.C.A. 156 (a)) provides as follows:

> "Any alien (except an addict who is not a dealer in, or peddler of, any of the narcotic drugs mentioned in this section) who, after February 18, 1931, shall be convicted and sentenced for violation of or conspiracy to violate any statute of the United States taxing, prohibiting, or regulating the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, or exportation of opium, coca leaves, heroin, or any salt, derivative, or preparation of opium or coca leaves, shall be taken into custody and deported in manner provided in sections 155 and 156 of this title. (Feb. 18, 1931, c. 224, 46 Stat. 1171.) * * * 'An act to provide for the deportation of aliens convicted and sentenced for violation of any law regulating traffic in narcotics.' "

The argument is made by appellant that since this act of February 18, 1931, employs the phrase "in manner provided in sections 155 and 156 of this title", which is a change from the phrase "in accordance with Sections 19 and 20 of the Act of February 5, 1917" found in the preceding narcotic act of May 26, 1922 (42 Stat. 596), that the recommendation of the Judge passing sentence supercedes the proviso "in manner provided in sections 155 and 156 of this title." In short, the contention of the appellant is that that portion of section 19 of the Act of 1917,

> "That the provision of this act respecting deportation of aliens convicted of a crime involving moral turpitude shall not apply to one who has been pardoned, nor shall such deportation be made or directed if the court, or judge thereof, sentencing such alien for such crime shall, at the time of imposing judgment or passing sentence or within thirty days thereafter, due notice having first been given to representatives of the State, make a recommendation to the Secretary of Labor that such alien shall not be deported in pursuance of this act".

applies in the instant case.

The quotation from Section 19 relates only to recommendations of the courts in cases of crime involving moral turpitude, and, read alone, appears not applicable to crimes under the Federal narcotic laws as they are held not to include that element. *Andreacchi v. Curran,* (D. C. S. D. N. Y.) 38 Fed. (2d) 498. However, the question cannot be disposed of on those facts.

In *Hampton v. Wong Ging and Wong Dick,* (C.C.A 9) 299 Fed. 289, the contention was that the defendants were not subject to deportation for the reason that the *supra* quoted provision of Section 19 of the Act of 1917 did not apply in that it dealt only with crimes involving moral turpitude. The court stated, referring to the Narcotic Act of 1922:

> "We think there can be no doubt that the later act, which provides that an alien convicted thereunder shall be taken into custody and deported 'in accordance with the provisions of sections 19 and 20 of the Act of February 5, 1917', adopts the whole of the provisions relative to deportation contained in those sections, and that the present cases are controlled by section 19."

The same question was raised in *United States v. George Wing,* (D.C.D. Nev.) 6 Fed. (2d) 896, in which the above decision was expressly approved. The court stating that the question to be decided was: "What did Congress intend by the phrase 'in accordance with sections 19 and 20'?" In reply to the query the court further stated:

> "* * * the deportation must be 'in accordance with' the provisions of section 19, as well as with section 20. Section 19 does not contain any provision as to the manner and procedure on deportation; such provisions are contained in section 20. There is only one clause in section 19 which could in any possible way limit, qualify, or define the right to deport for violations of the act of 1922, and that is the 'recommendation' clause."

In *Weedin v. Moy Fat* (C.C.A. 9) 8 Fed. (2d) 488, the Circuit Court of Appeals, after pointing out that the Narcotic Act of May, 1922, provided that an alien subject to deportation under the act shall:

> "* * * 'be taken into custody and be deported in accordance with the provisions of sections 19 and 20 of the Act of February 5, 1917, * * *' ".

held that deportation proceedings for a conviction under the said Narcotic Act of 1922 were subject to that language in Section 19 of the Immigration Act of 1917, which provides for deportation on the ground of sentence:

> "* * * 'to imprisonment for a term of one year or more because of conviction in this country of any crime involving moral turpitude.' "

and that therefore an alien who had been sentenced to but two months' imprisonment under that Narcotic Act could not be deported.

In opposition to that view the suggestion was made to the court

> "* * * that the Act of May 26, 1922, in adopting sections 19 and 20 of the prior Act, was intended to prescribe only the manner of taking into custody and the manner of deportation, * * *"

In regard thereto the court said it thought the intention was more inclusive, and was to limit "the authority to deport." The court said:

> "Section 19 contains no provision whatever concerning procedure or the manner of deportation. If it was the intention of the later act to adopt only the manner of deportation prescribed in the act of 1917, there was no occasion to refer to section 19."

The courts, in each of the above quoted cases, quote the provision "in accordance with sections 19 and 20." The reasoning of the courts in the above quoted decisions is not vitiated in the statements that the language in the former Narcotic Act providing for deportation "in accordance with sections 19 and 20" of the Act of 1917 relates to the right to *deport* and not merely to the *manner* of deportation.

The fact that the Narcotic Act of 1922 provides for deportation "in accordance with Sections 19 and 20" of the Immigration Act of 1917, whereas the later Narcotic Act provides for deportation "in the manner provided" in those sections of the 1917 Act presents a question similar to that before the Supreme Court in *Bugajewitz v. Adams,* 228 U. S. 585, involving the effect of the difference in language between Section 3 of the Immigration Act of February 20, 1907 (34 Stat. 898, 899) and that section as amended by the Immigration Act of March 26, 1910 (36 Stat. 263, 264). Section 3 of the 1907 Act provided that any alien woman found practicing prostitution within three years after entering the United States was to be deported "as provided by sections 20 and 21 of this act." That section of the 1907 Act was amended by

the Act of 1910 by striking out the limitation of three years and ordering deportation "in the manner provided by" Sections 20 and 21. The beginning of those two sections provided for the taking into custody of aliens subject to removal, within three years from entry, and it was argued that the three-year limitation was still in effect. The Supreme Court in that case said:

> "We are of opinion that the effect of striking out the three-year clause from section 3 is not changed by the reference to sections 20 and 21. The change in the phraseology of the reference indicates the narrowed purpose. The prostitute is to be deported, not 'as provided' but 'in the manner provided' in Sections 20, 21. Those sections provide the means for securing deportation, and it still was proper to point to them for that. *United States v. Weis,* 181 Fed. Rep. 860; *Chomel v. United States,* 192 Fed. Rep. 117."

In addition to the fact that the Supreme Court has ruled that the phrase "in the manner provided" is narrower that the phrase "as provided" and relates to the means of securing deportation, it must be recalled that the other decisions of the courts discussed above held that the phrase "in accordance with sections 19 and 20" relates to the right to deport as well as to the manner of deportation. Those facts require that the act under which the instant case was instituted, which provides for deportation "in the manner provided in section 19 and 20 of the Act of February 5, 1917" be regarded as employing that phrase as re-

lating to "manner" and not to right of deportation, unless the whole of that Narcotic Act contains some language requiring the construction that the phrase "in the manner provided" relates to the right to deport as well as the manner of deportation. No language in that act requires that that phrase be considered to relate to the right of deportation. On the contrary, another difference between the language of that act and that of the earlier Narcotic Act further indicates that that phrase relates only to manner of deportation. The difference of language and its effects should be pointed out. That language of the earlier Narcotic Act of 1922, with respect to deportation for certain violations of the Narcotic laws, reads:

> "Any alien who at any time after his entry is convicted."

In that connection it is to be recalled that that act provided that such alien shall be deported "in accordance with the provisions of Sections 19 and 20" of the Immigration Act of 1917. In *United States ex rel. Grimaldi v. Ebey, District Director of Immigration,* (C.C.A. 7) 12 Fed. (2d) 922, the question was whether an alien was subject to deportation under that act who was arrested more than five years after his arrival in this country. On his part it was contended that the language "any alien who at any time after his entry is convicted" was modified and controlled by the reference to Sections 19 and 20 of the Immigration Act of 1917, which fixes a five-year limitation period in certain cases. The court held that the language "at

any time after his entry'' in the Narcotic Act of 1922 controlled over any limitation found in Section 19 of the Act of 1917. However, that language, ''any alien who at any time after his entry,'' is not employed in the latter Narcotic Act under which the deportation proceeding was instituted in the present case, as that act relates only to ''any alien * * * who after the enactment of this act shall be convicted and sentenced'' with certain exceptions. The clause ''after the enactment of this act'' can hardly mean more than that the act is to apply solely to convictions and sentences arising after its enactment. Hence, deportation proceedings under that act are subject to the five-year limitation in section 19 if the language in that Narcotic Act reading ''in the manner provided'' in sections 19 and 20 included the provisions in section 19 relating to the right to deport as well as to the manner of deportation. The fact that Congress in the later act did not use the phrase ''at any time after his entry'' but changed the language from ''in accordance with the provisions of'' sections 19 and 20 to ''in the manner provided'' in those sections indicates that it was the intention of Congress for the last-mentioned phrase not to include the provisions of those sections relating to time limitations, or other provisions of that section relating to right of deportation. So the phrase must be held to include only those provisions relating to manner of deportation. Therefore, a recommendation of the court against deportation, being a provision relating to right of deportation, has no application to convictions and sentences of the class described in the

Narcotic Act of February 18, 1931, involved in the instant case.

In *The Conte Grande,* (D. C. S. D. N. Y.) 53 Fed. (2d) 475, the court, in interpreting the Act of February 18, 1931, stated:

> "This statute further provides that the deportation shall be 'in the manner provided in sections 19 and 20' of the Immigration Act of 1917 (8 U. S. C. A. secs. 155, 156). Counsel for the alien argues that by reason of the reference to these parts of the act of 1917, there can be no lawful deportation except for a cause and under conditions specified in sections 19 and 20 of the 1917 act. So to construe the new statute would nullify it. It is therein expressly provided that the 'manner' of the deportation shall be in accord with the provisions of the older statute. Sections 19 and 20 of the 1917 act (8 U.S.C.A. secs. 155, 156) prescribe what the manner of a deportation thereunder shall be. It is only to the extent of the manner thereby prescribed that the 1931 act requires that they be complied with. For this reason the court decisions cited by counsel as to the conditions of deportation under sections 19 and 20, as they existed previous to the Act of February 18, 1931, are not of assistance and have no pertinency here".

Appellant further contends that if Congress intended by the Act of February 18, 1931, to deprive the courts of their heretofore enjoyed power of staying deportation, that it would have done so in express terms. An examination of the Congressional Record

under date of February 10, 1931 (Record p. 4562) discloses that the title was amended in the Senate to read: "A Bill to provide for the deportation of aliens convicted and sentenced for violation of any law regulating traffic in narcotics." The amendment was agreed to by the House, February 14, 1931, (Record p. 5028), which title the Act now bears. Congress, in enacting the Act of February 18, 1931, did so with knowledge of the interpretation placed upon the words by the Ninth Circuit Court of Appeals, "upon warrant issued by the Secretary of Labor, be taken into custody and deported in accordance with the provisions of", and when Congress approved the wording in the phrase "be taken into custody and deported in manner provided in sections 155 and 156 of this title" it meant what it had expressly provided, that is to adopt only such parts of sections 19 and 20 as provided the *manner* of taking into custody and the *manner* of deporting.

It is respectfully submitted that the decision of the trial court should be affirmed.

Respectfully submitted,

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Received from the Appellee July 2, 1934, a copy of the foregoing Brief.

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